IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

THOMAS MURPHY,	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 02-453-SLR
	)	
BANCROFT CONSTRUCTION COMPANY,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM ORDER

At Wilmington this 7th day of June, 2004, having reviewed plaintiff's motion for re-argument and order vacating judgment and the papers submitted in connection therewith;

IT IS ORDERED that plaintiff's motion (D.I. 104) is denied for the reasons that follow:

1. On May 24, 2002, plaintiff Tom Murphy filed suit against defendant and former employer, Bancroft Construction Company, claiming that defendant: (1) breached the implied covenant of good faith and fair dealing; (2) intentionally interfered with his prospective employment; and (3) retaliated against him for filing a workers' compensation claim. (D.I. 1) Plaintiff also claimed that defendant engaged in racketeering in violation 18 U.S.C. § 1962 ("RICO"). (Id.)

On November 15, 2002, the court dismissed plaintiff's RICO claim pursuant to defendant's motion for judgment on the pleadings. (D.I. 23) On September 8, 2003, the court granted

defendant's motion for summary judgment as to plaintiff's implied covenant of good faith and fair dealing claim and his intentional interference with business relationship claim.[1] The court also ordered judgment to be entered in favor of defendant and against plaintiff. (D.I. 102)

2. The Federal Rules of Civil Procedure do not provide for motions for re-argument. Oglesby v. Penn Mutual Life Insurance Co., 877 F. Supp. 872, 892 (D. Del. 1995). However, the local rules for the District of Delaware allow for such motions. Local Rule 7.1.5 provides:

> A motion for re-argument shall be served and filed within [ten] days after the filing of the court's opinion or decision. The motion shall briefly and distinctly state the grounds therefor. Within [ten] days after service of such motion, the opposing party may serve and file a brief answer to each ground asserted in the motion. The court will determine from the motion and answer whether re-argument will be granted.

D. Del. L. R. 7.1.5.

Motions for re-argument should be granted sparingly and should not be used to rehash materials and theories already briefed, argued, and decided. Schering Corp. v. Amgen Inc., 25 F. Supp.2d 293, 295 (D. Del. 1998). Additionally, motions for "re-argument should never be granted if re-argument would not alter the previous results reached by the Court." Stairmaster Sports/Medical Prod., Inc. v. Groupe Procycle, Inc., 25 F. Supp.

[1]Plaintiff dropped his retaliation claim when he responded to defendant's motion for summary judgment. (D.I. 84)

2d 270, 292-293 (D. Del. 1998). Nevertheless, the court, in its discretion, may grant a motion for re-argument in three circumstances: (1) where the court has patently misunderstood a party; (2) where the court has made an error not of reasoning, but of apprehension; or (3) where the court has made a decision outside the scope of the issues presented to the court by the parties. Pirelli Cable Corp. v. Ciena Corp., 988 F. Supp. 424, 445 (D. Del. 1998)(citations omitted).

3. Plaintiff argues that re-argument is necessary as to his implied covenant of good faith and fair dealing claim.[2] Plaintiff contends that the court failed to appreciate that he directed his "whistleblowing" statements about defendant's practices to outside personnel (i.e., employees of the Capital School District), not internal personnel. Based on this distinction, plaintiff asserts that he did more than merely question defendant's internal practices; he blew the whistle on illegal activity.

4. The court finds plaintiff's argument unavailing. The distinction that plaintiff attempts to make is immaterial to the court's analysis of his implied covenant of good faith and fair dealing claim. In other words, the court concluded that plaintiff failed to implicate a public interest based entirely on

[2]Plaintiff refers to this implied covenant of good faith and fair dealing claim as his "whistleblowing claim."

the nature of his statements, not based the identity of the individuals to whom he made the statements. The court further observes that independent investigations by both the Office of the Auditor of Accounts for the State of Delaware and the Delaware Department of Justice[3] failed to uncover any wrongdoing. Thus, the court denies plaintiff's motion for re-argument as to the implied covenant of good faith and fair dealing claim.

4. Plaintiff also argues that re-argument is necessary as to his intentional interference with business relationship claim. Plaintiff complains that he offered testimony from the acting superintendent and one board member about his favorable characteristics and candidacy for the construction project field supervisor position. Plaintiff claims that such testimony was sufficient to create a genuine issue of material fact to avoid summary judgment. Plaintiff also claims that defendant did not act out of a privileged, legitimate business interest since he was not in competition with defendant and "the only way he could 'interfere' with the [Capital School District]/Bancroft business relationship would presumably be to provide detrimental information to [the Capital School District]

[3]Plaintiff, stepping into the shoes of the Capital School District, initiated a *qui tam* action pursuant to 6 Del. C. § 1201 in the Superior Court of the State of Delaware. (See D.I. 104 at 5) The Delaware Department of Justice terminated its *qui tam* investigation of defendant as of October 29, 2003, concluding that there was no substantial evidence that a violation of the Delaware False Claims Act occurred. (See D.I. 106)

about Bancroft." (D.I. 104 at 2)

5. The court finds that the above arguments simply re-hash arguments previously presented by plaintiff in response to defendant's motion for summary judgment. Plaintiff does not show that the court misunderstood his position, made an error of apprehension, or made a decision outside the scope of the issues presented to the court by the parties. As the court opined and shall repeat here for sake of clarity, plaintiff has not shown that he enjoyed a reasonable probability of employment with the Capital School District. He merely offered opinion testimony from one board member and the acting superintendent, who was not a board member, that he was a "viable candidate." Two opinions at a period of time when an open requisition for a construction project field supervisor did not even exist are not sufficient to create a genuine issue of material fact as to plaintiff's likelihood of employment with the Capital School District.

Moreover, the court evaluated both defendant's motive and interest in determining whether defendant intentionally interfered with plaintiff's opportunity for employment with the Capital School District. The court concluded that defendant acted out of a privileged, legitimate business interest in maintaining its contract with the Capital School District. That plaintiff is not in competition with defendant does not bear upon whether he could interfere with defendant's relationship with the

Capital School District, contrary to plaintiff's suggestion. The court finds that defendant was justified in sharing its concerns about plaintiff's work with the Capital School District. The court, therefore, denies plaintiff's motion for re-argument as to the intentional interference with business relationship claim.

6. Finally, plaintiff asserts that he should be permitted to amend his complaint to add a new age discrimination claim against defendant due to the fact that the Equal Employment Opportunity Commission ("EEOC") discontinued its investigation of his age discrimination charge as of July 29, 2003 in light of the instant litigation, even though he has not yet received a right to sue letter from the EEOC.[4] (See D.I. 104, ex. B) At the outset, the court finds the fact that plaintiff has not received a right to sue letter irrelevant to the question of whether he should be permitted to amend his complaint at this point in time. Pursuant to 29 U.S.C. § 626(d), a plaintiff who has filed a charge for age discrimination under the Age Discrimination in Employment Act ("ADEA") with an administrative agency may file a civil suit based on the same charge any time sixty days after filing the charge with the agency. Plaintiff filed his ADEA charge on June 17, 2002. Therefore, any time from August 17, 2002, the sixty-day time point, to November 19, 2002, the

[4]On June 17, 2002, shortly after filing the instant suit, plaintiff filed an age discrimination charge with the EEOC.

deadline for amending the complaint per the court's scheduling order, plaintiff could have amended his complaint to add the age discrimination claim that he now wishes to lodge against defendant. Plaintiff failed to do so.

Furthermore, claim preclusion bars plaintiff from raising age discrimination claims at this time.

> Claim preclusion gives dispositive effect to a prior judgment if "a particular issue, although not litigated, could have been raised in the earlier proceeding. Claim preclusion requires: (1) a final judgment on the merits in a prior suit involving; (2) the same parties or their privities; and (3) a subsequent suit based on the same cause of action. Courts should not apply this conceptual test mechanically, but should focus on the central purpose of the doctrine, to require a plaintiff to present all claims arising out the same occurrence in a single suit.

Churchill v. Star Enter., 186 F.3d 184, 194 (3d Cir. 1999) (quoting U.S. v. Athlone Indus., Inc., 746 F.2d 977, 984 (3d Cir. 1984)). The Third Circuit has employed a broad view of what constitutes "the same cause of action" for purposes of claim preclusion because courts have not defined this phrase. Churchill, 186 F.3d at 194 (citing Athlone, 746 F.2d at 984). Generally speaking, this question "turns on the essential similarity of the underlying events giving rise to the various legal claims." Churchill, 186 F.3d at 194 (quoting Athlone, 746 F.2d at 984).

The first two requirements of the test for claim preclusion are readily met under the facts at bar. Pursuant to defendant's

motion for summary judgment, the court issued a judgment in favor of defendant and against plaintiff. As for the third requirement, i.e., whether the cause of action was the same, the court finds that an age discrimination claim would be grounded on the precise events underlying the breach of implied covenant of good faith and fair dealing and the intentional interference with business relationship claims. Indeed, the Tenth Circuit has opined that "all claims arising from the same employment relationship constitute the same transaction or series of transactions for claim preclusion purposes." Mitchell v. City of Moore, 218 F.3d 1190, 1202 (10th Cir. 2002). Therefore, the court concludes that plaintiff now seeks to take a second bite at the apple by amending his complaint to add an age discrimination claim at this late date when he could have done so as of August 17, 2002. Accordingly, the court denies plaintiff's motion to vacate judgment to permit him to amend his complaint to add an age discrimination claim.

Sue L. Robinson
United States District Judge